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No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF NEBRASKA,
Plaintiff,
vs.

STATE OF WYOMING,
Defendant.

COLORADO'S BRIEF IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

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INTRODUCTION

On October 9, 1991, the State of Nebraska filed a Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Motion to File Amended Petition), an Amended Petition for an Apportionment of Non-Irrigation Season Flows (Amended Petition), and a Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Supporting Brief). The Motion to File Amended Petition, Amended Petition, and Supporting Brief were filed almost exactly five years after this case was commenced as an action to enforce the decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) (the Decree), and more than three years after this

Court summarily denied Nebraska's first motion to amend its petition to add a claim to modify the Decree. *Nebraska v. Wyoming*, 485 U.S. 931 (1988)

Nebraska represents that "[t]his motion to amend bears no relation to the motion of January 11, 1988." Supporting Brief at 5, 36-37. While Nebraska's new motion and petition are framed differently, the similarity of result sought by the two amended petitions shows that Nebraska subscribes to the adage that there is more than one way to skin a cat. This is simply the latest round in the continuing efforts of Nebraska and several amici curiae to reopen the Decree and expand the scope of what began as a straightforward enforcement action against Wyoming into a full-blown equitable apportionment proceeding to increase Nebraska's water supply from the North Platte River.

Thus, the issue before the Court is whether to allow Nebraska to reopen the 46-year old Decree and transform this enforcement action against Wyoming, the merits of which have yet to be decided, into a new and completely different case -- one to reapportion the flows of the North Platte River.[1]

Nebraska would have the Court believe that this new case would be solely between Nebraska and Wyoming and would not affect Colorado, alleging: "The Decree specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season." Amended Petition at 2; *see also* Supporting Brief at 6. Despite this matter-of-fact statement

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[1]This brief is directed only to Nebraska's request for an apportionment of non-irrigation season flows, and does not address Nebraska's request to assert new claims against Wyoming and the United States.

that the Decree specifies Colorado's entire apportionment, Nebraska never actually says what that apportionment is. However, it appears that Nebraska is, in fact, asking the Court to apportion "unapportioned flows" that have already been apportioned to Colorado. Colorado therefore has an important stake in Nebraska's attempt to reopen and modify the Decree and urges the Court to reject Nebraska's Motion.

STATEMENT OF THE CASE

In its brief in opposition to Nebraska's previous motion to amend its petition, Colorado summarized the scope of the North Platte Decree and the history of this case from its filing in 1986 to Nebraska's 1988 motion to amend, noting that Nebraska had dramatically changed its position. Nebraska ostensibly brought this case solely to enforce the existing Decree against Wyoming. By 1988, however, when Nebraska moved to amend its petition, it wanted much more: it wanted to modify the Decree to include an entirely new apportionment for uses other than irrigation, to expand the geographic scope of the Decree, and to further restrict Colorado's uses under the Decree. At that time, Colorado observed that "the inescapable conclusion is that Nebraska desires to reopen the Decree to increase her apportionment at Colorado's expense." Colorado's Brief in Opposition to Motion to Amend Petition at 5 n.2 (February 12, 1988).

Today, more than three years after this Court denied Nebraska's motion, the inescapable conclusion is that nothing has changed. Nebraska is still seeking to reopen th Decree to increase its apportionment, apparently still at Colorado's expense. Now, however, instead of asking for a new apportionment to serve non-irrigation uses in a different geographic area, it has changed its terminology to ask for an

apportionment of non-irrigation season flows. From a practical standpoint, there is little difference as far as Colorado is concerned.

In support of its assertion that the Decree specifies Colorado's equitable apportionment in its entirety during the non-irrigation season, Nebraska relies on two provisions that impose certain numeric limitations on Colorado's use of the North Platte River and its tributaries [2]: paragraph I(b), which enjoins Colorado from storing more than a total amount of 17,000 acre feet of water for irrigation purposes in Jackson County, Colorado, between October 1 of any year and September 30 of the following year (325 U.S. at 665); and paragraph I(c), which enjoins Colorado from exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, more than 60,000 acre feet of water in any period of 10 consecutive years reckoned in continuous progressive series beginning with October 1, 1945 (325 U.S. at 665). Amended Petition at 2-3; Supporting Brief at 6. According to Nebraska, these are the only provisions in the Decree that equitably apportion the non-irrigation season flows of the North Platte River to Colorado. Amended Petition at 3.

Nebraska ignores an additional paragraph of the Decree which expressly provides:

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic,

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[2]The Decree does not affect this Court's previous apportionment between Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River. Decree, para. XII(d), 325 U.S. at 671.

municipal and stock watering purposes and consumption.

Decree, para. X., 325 U.S. at 670. Moreover, the Decree is silent concerning the diversion or storage of water for all other (*e.g.*, industrial, fish and wildlife, or recreational) in-basin uses.

Thus, Nebraska fails to address Colorado's right during the non-irrigation season (or the irrigation season) to make in-basin use of the waters of the North Platte River for ordinary and usual domestic, municipal, and stock watering purposes and for any other beneficial purposes besides irrigation. If, by saying that the Decree specifies Colorado's equitable apportionment in its entirety, Nebraska recognizes that all uses by Colorado that are not expressly enjoined are permitted without restriction, Colorado and Nebraska are in agreement. If, on the other hand, Nebraska reads the Decree to in any respect limit Colorado's in-basin non-irrigation uses, such an "interpretation" would prohibit uses not now enjoined by the Decree, some of which are expressly permitted. This would be a modification of the Decree, which Colorado would strenuously oppose. In light of Nebraska's previous attempt to amend its petition, in which it sought to enjoin all new development by Colorado (Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree at 6 (January 11, 1988)), Colorado assumes that Nebraska's interpretation of Colorado's non-irrigation season apportionment is restrictive, rather than permissive.[3]

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[3]Another possible interpretation of the Decree is that it does not specify Colorado's equitable apportionment in its entirety. However, that interpretation is directly contrary to Nebraska's asserted position.

Given the ambiguity of Nebraska's representations concerning Colorado's non-irrigation season apportionment, and absent assurances from the other parties that they interpret the Decree to impose no restrictions on Colorado's in-basin non-irrigation uses of the North Platte River, Colorado has an important interest in assuring that Nebraska's claim for an apportionment of non-irrigation season flows does not result in modification of the Decree to impose additional constraints on Colorado uses.

ARGUMENT

I. NEBRASKA HAS FAILED TO SATISFY THE STANDARDS FOR REOPENING AN EQUITABLE APPORTIONMENT DECREE.

A. *Arizona v. California* articulates the standards for upsetting settled expectations by relitigating an equitable apportionment decree.

Nebraska argues at length, and with many citations of supporting authority, that "the apportionment of non-irrigation season flows is an appropriate action in the Court's original jurisdiction" and that "equitable apportionment presents a justiciable controversy." Supporting Brief at 11-31. However, Nebraska's arguments misrepresent the nature of the relief sought, and the authority cited is therefore inapposite. Try as it may, Nebraska cannot turn its Amended Petition into a request for a new equitable apportionment, when it is really a request to reopen and modify a decree that has been in place since 1945 (as modified by stipulation of the parties in

1953). Nebraska's Motion to File Amended Petition must be judged by the standards for reopening a long-standing decree and upsetting an apportionment that is "an historic fact." Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or to Participate as Litigating Amicus Curiae at 2 (April 3, 1987).

In *Arizona v. California*, 460 U.S. 605 (1983), this Court articulated the standard for deciding whether to entertain a motion to modify an existing equitable apportionment decree. The question there was whether to reopen the determination of practicably irrigable acreage within reservation boundaries to consider claims for "omitted" lands for which water rights could have been sought in the litigation preceding the 1964 decree. The Court held that, despite a reserved jurisdiction paragraph in the decree very similar to the one in this case, the prior determination of Indian water rights in the 1964 decree precluded relitigation of the irrigable acreage issue.

Article IX of the 1964 decree in *Arizona v. California*, 376 U.S. 340, 353 (1964) states:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Despite the broad language of Article IX, the Court held that it should be read narrowly "and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously

litigated." 460 U.S. at 619. The Court observed that while the technical rules of preclusion were not strictly applicable, the principles underlying the rules should inform the Court's decision, particularly with respect to water rights in the arid western states:

> Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country.... The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Id. at 620 (citation and footnote omitted).

The Court also feared that "the urge to relitigate, once loosed, will not be easily cabined," recognizing that it would be hard to draw a defensible line separating issues that could and could not be relitigated and that "[i]t would be counter to the interests of all parties to this case to open what may be a Pandora's Box, upsetting the certainty of all aspects of the decree." *Id.* at 625.

B. Nebraska does not allege changed circumstances that would justify reopening the Decree.

Nebraska's motion does not raise the type of changed circumstances alluded to in *Arizona v. California* and

contemplated by paragraph XIII of the Decree in this case. 325 U.S. at 671-672. Nebraska's request to reopen the Decree is premised on alleged threats by Wyoming to "downstream equities" in Nebraska. No threat of upstream development in Colorado is alleged. The alleged threats by Wyoming fall into two categories: (1) potential water development projects and legal positions taken by Wyoming that are already the subject of the pending action to enforce the Decree and for injunctive relief; and (2) additional potential projects that "are being watched closely by Nebraska" (Supporting Brief at 20), but which are apparently too speculative and remote to be included in the enforcement action.

The first category of threat is, of course, already included in this action (indeed, numerous motions for summary judgment covering all these projects and issues are now before the Special Master awaiting decision) and Colorado believes it is not disputed that if any actions by Wyoming are found to have violated the Decree, the measure of damages would include consequential injuries to interests not directly protected by the Decree. In light of this, the first category of alleged threats hardly justifies throwing open the Decree. Wyoming is addressing the second category of alleged threats in its response to Nebraska's motion. Colorado expects Wyoming to demonstrate that the projects listed by Nebraska do not constitute a significant threat of new depletions to the North Platte River.

As far as downstream equities are concerned, Nebraska's position is equally tenuous, since Nebraska's problems are largely of its own making. Nebraska states, "Downstream equities in Nebraska have not had an adequate water supply for some time, and competition is intense for the limited supply that is available." Supporting Brief at 15.

Nebraska goes on to describe that "intense" and expensive competition, largely between agricultural and environmental interests. *Id.* at 15, 34-35. It is hardly surprising that, in the arid West, the competition -- intrastate as well as interstate -- for water from over-appropriated streams is often intense. The Court has recognized this competition in the context of federal reserved water rights. *See, e.g., United States v. New Mexico*, 438 U.S. 696, 699 (1978) ("In the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.").

Two downstream equities relied on by Nebraska are recreational uses and fish and wildlife uses, including endangered species habitat. Supporting Brief at 18-19. These equities are threatened by **other Nebraska water users**, since Nebraska has yet to grant any instream flow water rights to protect habitat flows on either the North Platte or Platte River. Deposition of J. Michael Jess, Vol.I at 142-143 (Nov. 28, 1989). Only now is Nebraska finally even **considering** granting an instream flow permit for certain reaches of the Pla.te River.. Supporting Brief at 33-34. Moreover, Nebraska does not regulate groundwater pumping that depletes the North Platte and Platte Rivers. Jess Deposition, Vol. I at 29-30, 57-58; *see also* Vol. IV at 78-79 (Feb. 2, 1990). Additionally, in 1986, Mr. Jess, Director of the Nebraska Department of Water Resources, issued a permit for the Catherland Reclamation Project to divert and transport out of the basin about 125,000 acre-feet of water per year just upstream of the Big Bend reach of the Platte River. *Id.* Vol. IV at 153-154. Mr. Jess issued the permit despite "a substantial volume of testimony, exhibits and evidence in general offered on the impacts the Catherland project would have on wildlife in the Platte Valley as well as wildlife habitat impacts in the area where the water would

have been taken." *Id.* at 154.[4] Mr. Jess also stated that it is doubtful that Nebraska would forego all further water development projects on the North and South Platte Rivers to protect the endangered species on the Platte River. *Id.* at 175.

Given Nebraska's unwillingness to itself protect what it claims are important equities, it is difficult to envision how this Court could do so in this proceeding. And, indeed, Nebraska frankly states that it "does not seek to have the Court enter into 'intramural disputes' within the State of Nebraska over the allocation of its water resources, nor does it believe that doing so would be prudent." Supporting Brief at 35.[5] Having failed to make hard decisions about water allocation, and finding itself in a position where federal agencies may be making some of those decisions for it (*id.* at 34-35), Nebraska now seeks to resolve its internal conflicts by appealing to this Court for more water from its neighboring states, and asking the Court to trust it to distribute that water equitably among competing water users within the state. Considering Nebraska's record of disregarding fish and

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[4]The Nebraska Supreme Court set aside the permit on the ground that assignment of the application was void. *Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist.*, 230 Neb. 580, 433 N.W.2d 161 (1988).

[5]Nebraska previously opposed intervention by the Platte River Trust because Nebraska feared the Trust would expand the scope of the case to seek "intrastate relief in the form of minimum instream flows in Nebraska." Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 3 (April 3, 1987). While not wanting instream flows in Nebraska to be established in this case, Nebraska seems to have reverted to its Grayrocks Reservoir strategy of protecting Nebraska agricultural uses "under the wing of the endangered whooping crane." Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1, 20 (1985).

wildlife habitat and its past failure to resolve its internal water allocation conflicts, Nebraska has not met the strict test of *Arizona v. California* for relitigating an equitable apportionment decree.

II. NEBRASKA'S AMENDED PETITION PRESENTS THE VERY SAME PROBLEMS AS THE PETITION REJECTED BY THE COURT IN 1988.

Nebraska assures the Court that "[t]his amended petition is quite different from the one filed in 1988." Supporting Brief at 37. The alleged difference is that the 1988 petition asked the Court to modify the Decree to apportion water to protect fish and wildlife interests during the irrigation season while "the present motion presents a classic equitable apportionment of the previously unapportioned, non-irrigation season flows." *Id.*

In its 1988 petition, Nebraska requested the Court, *inter alia*, to:

> (3) Explicitly recognize the apportionment of North Platte River waters to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat;
>
> (4) Enjoin the State of Colorado and the State of Wyoming and their agencies from approving new appropriations of the waters of the North Platte River and its tributaries, and to enjoin the State of Colorado, the State of Wyoming, and the United States and their

> agencies from authorizing or sanctioning construction of new storage projects on the North Platte River and its tributaries which would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska to maintain and preserve critical wildlife habitat;...

Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree at 6 (January 11, 1988).

Contrary to Nebraska's representation that "[t]he 1988 amended petition sought relief for fish and wildlife interests **during the irrigation season**," (Supporting Brief at 37 (emphasis added)) the 1988 amended petition included no seasonal limitation; it sought a year-round apportionment for downstream fish and wildlife interests. Nebraska's new Amended Petition is broader than its 1988 petition insofar as it requests an apportionment for other downstream uses as well as **the same fish and wildlife interests asserted in 1988**. The new petition is in another respect narrower in that, unlike the 1988 petition, it is limited to the non-irrigation season; however, when combined with Nebraska's expansive reading of the Decree to apportion to it the "regimen of the river" during the irrigation season (*see, e.g.,* Supporting Brief at 11; Nebraska's Motion for Partial Summary Judgment at 7-8 (March 1, 1991); Nebraska's Brief in Support of Motion for Partial Summary Judgment at 127 n.62 (March 1, 1991)), the practical effect is virtually identical. Just as the 1988 and 1991 petitions seek the same result, they suffer from the same defects.

Colorado responded at length to Nebraska's 1988 motion, pointing out that the amended petition would

embroil the Court in a trial of exceedingly complex water resource planning and policy issues in a hypothetical context, which might never present a justiciable controversy. *See* Colorado's Brief in Opposition to Motion to Amend Petition (February 12, 1988). This is so because application of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. I 1989), and § 404 of the Clean Water Act, 33 U.S.C. § 1344 (1988), just two of a host of federal laws that affect water development in all the states,[6] may well resolve Nebraska's wildlife habitat concerns in other forums. *See, e.g., Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985); *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep.Cas. (BNA) 1156 (D.Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation*, 594 F.2d 870 (8th Cir. 1979). While Nebraska would have the Court believe that it deserves special relief from the burdens of compliance with federal environmental legislation, as *Riverside* and *Nebraska v. Rural Electrification Administration* show, these burdens fall equally on all three states.

Not only would hearing Nebraska's fish and wildlife habitat claim involve this Court in a quagmire of technical issues best resolved in other forums, it could actually preempt the determination of those issues by the administrative and judicial tribunals that are responsible under federal statutes for making them. For example, if this Court undertakes to determine the habitat requirements of the whooping crane, least tern, and piping plover below Lake McConaughy, how will that affect the Federal Energy Regulatory Commission relicensing proceedings for Kingsley

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[6]*See also, e.g.*, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370b, (1988 & Supp. I 1989); the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1988); the Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1988); and the *Electric Consumers Protection Act of 1986*, Pub. L. No. 99-495, 100 Stat. 1243 (1986).

Dam that have been underway since 1984? Supporting Brief at 34-35. Scientific investigations and decisions in both ongoing and future federal statutory proceedings involving the North Platte, South Platte, and Platte River basins are likely to be constrained by any findings of technical facts made in this case.

III. THE COURT SHOULD NOT DELAY RESOLUTION OF THE MERITS AND INCREASE LITIGATION EXPENSES BY DEFERRING DISPOSITION OF NEBRASKA'S REQUEST TO MODIFY THE DECREE.

Nebraska's arguments to the contrary notwithstanding, the Court is not bound to grant any well pled motion to amend simply because it is phrased in terms of an equitable apportionment. The liberal amendment policies of Rule 15(a) of the Federal Rules of Civil Procedure do not apply to actions within the original and exclusive jurisdiction of the Supreme Court. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). In that case, this Court applied the same standard to the motion to amend that it applies to a motion for leave to file a complaint, noting that the requirements of a motion for leave to file and a brief in opposition permit and enable the Court to dispose of matters at a preliminary stage. The Court explained:

> Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay

> adjudication on the merits and needlessly add to the expense that the litigants must bear.

Id. at 644. Applying that standard, the Court denied Ohio's motion to amend.

The reasons for denying the motion to amend are equally compelling here. As in *Ohio v. Kentucky*, the motion to amend was filed five years after the case was commenced. Pending motions for summary judgment may dispose of all or many of the outstanding issues. It would be unfair to the other parties to delay resolution of the merits as the case now stands and to needlessly add to the expense that they must bear based on a motion to amend that, as demonstrated above, manifestly fails to satisfy the criteria enunciated in *Arizona v. California*, 460 U.S. 605 (1983), for reopening an equitable apportionment decree.

CONCLUSION

Colorado respectfully requests that the Court deny Nebraska's Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows.

Respectfully submitted,

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